Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, DC 20554

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| In the Matter of | ) | |
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| Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands | ) | WT Docket No. 03-66<br>RM-10586 |
| | ) | |
| Part 1 of the Commission's Rules - Further Competitive Bidding Procedures | ) | WT Docket No. 03-67 |
| | ) | |
| Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service to Engage in Fixed Two-Way Transmissions | ) | MM Docket No. 97-217 |
| | ) | |
| Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico | ) | WT Docket No. 02-68<br>RM-9718 |
| | ) | |

**REPLY COMMENTS OF GRYPHON WIRELESS L.L.C.**

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October 22, 2003

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## EXECUTIVE SUMMARY

Gryphon Wireless L.L.C. ("Gryphon") urges the Commission to adopt the Coalition's proposal for revising the MDS/ITFS regulatory regime. As a rural provider poised to launch wireless broadband facilities in Nebraska, Gryphon is concerned with some of the alternative proposals espoused by commenters in response to the Notice of Proposed Rulemaking ("NPRM"). These proposals would substantially undermine Gryphon's ability to provide wireless broadband service.

First, Gryphon is fundamentally opposed to any plan that would limit a licensee's ability to deploy either FDD or TDD technology and to migrate freely between either technology depending on marketplace demand and technology evolution. Under plans proposed by Fixed Wireless Holdings and NextNet Wireless limiting the choice of technology, Gryphon would be precluded from operating TDD technology on the A Group channels it has leased and would be forced to cease operations as none of the channels that they would reserve for TDD technology would be available for Gryphon in its initial market.

Second, Gryphon is opposed to the plan espoused by ArrayComm, Inc. ("ArrayComm") that requires a licensee to make an initial selection of paired or unpaired spectrum prior to receiving new spectrum assignments within the 2500-2690 MHz band based on those selections. Such a proposal would wreak havoc on the industry as spectrum re-assignment would occur on a market-by-market basis. Adoption of the ArrayComm proposal would undermine the approach advanced by the Coalition to develop exclusive Geographic Service Areas ("GSAs") by "splitting the football" created by overlapping protected service areas ("PSAs") and would result in the re-introduction of overlapping service areas that neither licensee can serve.

Third, the Commission should reject any rebanding proposal that would create narrow paired spectrum by sacrificing larger, continguous spectrum blocks. Smaller spectrum blocks are insufficient to meet marketplace demand for TDD systems and would also impose significant additional costs on licensees to either add the necessary non-contiguous spectrum or add additional cells to increase frequency use. Such a proposal would likely result in certain band segments going unused in FDD systems and would serve the interests of neither TDD nor FDD system operators.

Finally, Gryphon strongly objects to any proposal to either void all existing capacity leases or to declare unlawful any existing lease with a remaining term of more than three years. Not only does the Commission have questionable legal authority to invalidate existing leases, but the termination of ITFS and MDS spectrum leases would be contrary to the Commission's goal of promoting the use of spectrum leases as a mechanism for maximizing spectrum utilization. Declaring leases with more than three years invalid is in direct contradiction of the Commission's clear and unambiguous policy that ITFS excess capacity leases may extend fifteen years. Instead the Commission is best served by preserving existing leases instead of engaging in blanket lease terminations.

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## REPLY COMMENTS OF GRYPHON WIRELESS L.L.C.

Gryphon Wireless L.L.C. ("Gryphon") hereby submits its reply to the comments filed in response to the Commission's *Notice of Proposed Rulemaking* ("*NPRM*") in the captioned proceeding.[1] Gryphon is deploying wireless broadband facilities in rural areas of Nebraska utilizing spectrum in the 2500-2690 MHz band, and will be launching commercial service on its first system in a matter of weeks. However, adoption of certain of the proposals advanced in response to the *NPRM* would substantially undermine Gryphon's efforts, depriving the citizens of rural Nebraska of the substantial benefits a wireless broadband system can offer.

[1] *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, 18 FCC 6722 (2003)["*NPRM*"].

*A. The Commission Should Not Mandate The Use Of Specific Technologies On Specific Channels.*

At the outset, Gryphon is fundamentally opposed to proposals advanced in the remarkably similar filings of Fixed Wireless Holdings, LLC ("Fixed Wireless") and NextNet Wireless, Inc. ("NextNet") that would reserve the channels in the lower and upper portions of the 2500-2690 MHz band for frequency division duplex ("FDD") technology only, limiting time division duplex ("TDD") technology to a small number of channels in the middle of the band.[2] As a system operator, Gryphon strongly agrees with such commenting parties as the Wireless Communications Association International, Inc., the National ITFS Association, the Catholic Television Network (collectively, the "Coalition"), Earthlink, Inc., Sprint Corporation and many others that the public interest will best be served by affording each licensee the ability to deploy either FDD or TDD technology, and to migrate freely between those two alternatives as marketplace demand and technology evolves.[3] While Gryphon has decided initially to deploy TDD technology for its first system (and ironically has contracted to purchase NextNet

[2] *See* Comments of Fixed Wireless Holdings, WT Docket No. 03-66, at 5 (filed Sept. 8, 2003)(proposing that the 48 MHz in the lower portion of the band (currently the A and B Group channels) and 46 MHz in the upper portion (currently the G, H and I Group channels) be reserved for FDD use only, and the 96 MHz in the center (currently the C, D, E and F Group channels) be available solely for TDD use)["Fixed Wireless Comments"]; Comments of NextNet Wireless, WT Docket No. 03-66, at 4 (filed Sept. 8, 2003)(proposing establishment of equal spectrum reserves for FDD and TDD, with FDD spectrum in the upper and lower portions of the band and TDD in the middle)["NextNet Comments"]. Gryphon notes that while Nokia Inc. has not specifically called for the reservation of spectrum solely for FDD technology, it apparently believes that the entire band should be reserved for FDD usage to avoid the guardbands that are today necessary between TDD and FDD systems. Nokia has stated that "establishing formal channel pairings is the best approach to minimizing problems in this band and ensuring a sufficiently predictable interference environment. Without specifying the technologies to be deployed, we believe the Commission should determine if a particular channel is uplink only or downlink only." Comments of Nokia Inc., WT Docket No. 03-66, at 3 (filed Sept. 8, 2003). Given that TDD technology does not utilize channel pairings, but instead requires that a given channel be used for both upstream and downstream transmissions, it certainly appears that Nokia is attempting to preclude TDD deployments.

[3] *See* Comments of Wireless Communications Ass'n Int'l *et al.*, WT Docket No. 03-66, at 10-13 (filed Sept. 8, 2003)["Coalition Comments"]; Comments of Earthlink, WT Docket No. 03-66, at 6-7 (filed Sept. 8, 2003); Comments of Sprint, WT Docket No. 03-66, at 5-6 (filed Sept. 8, 2003); Comments of BellSouth *et al*, WT Docket No. 03-66, at 7-8 (filed Sept. 8, 2003); Comments of Hardin and Associates, WT Docket No. 03-66, at 4 (filed Sept, 8, 2003)["Hardin Comments"].

equipment), it continues to monitor the development of FDD alternatives with interest for possible future deployment. Only time will tell whether one or the other technology will predominate, and the Commission can best promote the most effective and efficient use of the 2500-2690 MHz band by allowing the marketplace to determine the best mix of TDD and FDD over time.[4]

Were the Commission to mandate the use of particular technologies on particular channels as suggested by Fixed Wireless and NextNet, it will strike a devastating blow to Gryphon's wireless broadband deployment plans. As noted above, Gryphon will be utilizing TDD technology in its initial deployment, which will take place in a small Nebraska market. As a practical matter, it has no choice since the only second-generation wireless broadband systems that are currently available utilize TDD technology. Gryphon has leased excess capacity on the A Group channels, which are the only channels available to it in the market. Since entering into that lease, Gryphon has secured the necessary interference consents from every neighboring licensee that might be adversely impacted by Gryphon's proposed deployment of TDD

[4] It is worth noting that while Fixed Wireless and NextNet both propose an essentially equal division of the spectrum between TDD and FDD, neither presents any evidence that such a division accurate reflects marketplace demand. That is not surprising, as it has been found that "[i]t is premature" to determine at this time the amount of spectrum that will be used for TDD or for FDD. ITU WP 8F Document 8/1023-E, *Draft Revision of Recommendation ITU-R M.1036-1: Frequency arrangements for implementation of the terrestrial component of International Mobile Telecommunications 2000 (IMT-2000) in the bands 806-960 MHz, 1710-2025 MHz, 2110-2200 MHz and 2500-2690 MHz*, Section 6.1.3 (Feb. 28, 2003). The Commission should take notice that at present most of the commercially-available second-generation wireless broadband systems utilize TDD technology. Thus, adoption of the Fixed Wireless/NextNet plan could leave a substantial quantity of spectrum laying fallow for the foreseeable future.

Moreover, the Fixed Wireless/NextNet proposal runs counter to long-term global harmonization efforts. Although the early trend was towards establishment of separate FDD and TDD bands initially, for the long term "[i]t is recommended that the frequency arrangements should, to maintain flexibility of deployment, be available for use in either FDD mode, TDD mode, or both, and should not, ideally be segmented between FDD and TDD modes in paired spectrum except where necessary for technical and regulatory reasons." *Id.* at Section 6.3. Since the Coalition has demonstrated that, with appropriate spectral masks, TDD and FDD can share the 2500-2690 MHz band without separating the two technologies into discrete bands, there is no reason for the Commission to ignore this preference for flexibility.

technology on the A Group channels, has secured a lease for the installation of its base station, and has assisted the excess capacity lessor in securing the necessary FCC authorization to deploy. These efforts will all be for naught, however, if Fixed Wireless and NextNet now have their way, since Gryphon and its ITFS partner would be precluded from using the A Group channels for TDD technology.

This illustrates the fundamental flaw in the Fixed Wireless/NextNet proposal. Although they never acknowledged it, the Commission cannot forget that the Commission's MDS and ITFS rules currently permit licensees to freely deploy either TDD or FDD technology. Gryphon and others have deployed or soon will deploy wireless broadband systems utilizing TDD technology on spectrum they would reserve for FDD under the Fixed Wireless/NextNet proposal. Surprisingly, neither Fixed Wireless nor NextNet even address the serious adverse consequences of their proposal on existing system operators and the licensees that lease them capacity. In the case of Gryphon, adoption of the Fixed Wireless/NextNet proposal would require Gryphon to cease operations, as none of the channels that would be reserved for TDD technology are available to Gryphon. The simple fact is this – if Gryphon cannot utilize TDD technology on the A Group channels, it cannot provide wireless broadband service in its target market.[5]

[5] For similar reasons, Gryphon also opposes the proposal by the New America Foundation and other so-called "public interest" groups to strip the 90 MHz at 2500-2590 MHz from the current MDS/ITFS licensees for unlicensed use. *See* Comments of New America Foundation, WT Docket No. 03-66, at 18-20 (filed Sept. 8, 2003). Adoption of this proposal – which naively presumes that unlicensed allocations will somehow lead to superior use of the spectrum compared to licensed allocations – would preclude Gryphon's service in its initial market. Indeed, the Commission lacks authority to adopt this proposal under Section 553(c) of the Administrative Procedures Act. 47 U.S.C. § 553(c)(2003). That provision requires the Commission to give advance notice of proposed rules and bans the adoption of rules that are not logical outgrowths of those proposed. *See, e.g. Sprint v. FCC*, 315 F.3d 369, 375-76 (D.C. Cir. 2003). Reallocating 90 MHz of the MDS/ITFS allocation for unlicensed use was not suggested by the *NPRM*. To the contrary, the Commission expressly provided in the *NPRM* that "we do not intend to evict any incumbent licensees from the affected band." *See NPRM*, 18 FCC Rcd at 6725.

Because the 2500-2690 MHz band is already licensed by the Commission on an unpaired basis with rules that allow the deployment of TDD or FDD technology on every channel, the situation before the Commission in this proceeding is fundamentally different from that presented by the only precedent cited by Fixed Wireless and NextNet – the lower 700 MHz band.[6] There, the Commission is clearing the band of incumbents for auction to new licensees and thus the preservation of existing deployments and/or the business plans of existing licensees was not at issue. Because the lower 700 MHz band is being vacated by incumbents, the Commission had the flexibility to restructure the lower 700 MHz band on whatever basis it choose, without adversely impact existing licensees. While the Commission decided to auction some paired spectrum and some unpaired spectrum, it is significant (and contrary to what Fixed Wireless and NextNet inaccurately imply)[7] that even then the Commission did not reserve specific portions of the lower 700 MHz band for TDD or for FDD. In fact, while the Commission established paired and unpaired channels for auction, any of the lower 700 MHz band channels can be used for TDD or for FDD regardless of whether they are paired or not.[8]

Thus, the lower 700 MHz hardly serves as precedent for forcing existing licensees of the lower and upper channels in the 2500-2690 MHz band to abandon TDD and instead deploy FDD technology. To the contrary, the Commission's regulatory regime for the lower 700 MHz band "allows licensees to make determinations respecting the services provided and technologies to be used, including provision of the full range of FDD- and TDD-based wireless services."[9] The

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[6] *See* NextNet Comments at 4-5; Fixed Wireless Comments at 5.

[7] *See id*.

[8] *See Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, 17 FCC Rcd 1022, 1053-57 (2002).

[9] *Id.* at 1071.

same approach towards affording licensees full technological flexibility has also been applied to the upper 700 MHz band, and can and should be adopted here.[10]

*B. The Commission Should Reject ArrayComm's Proposal Because It Will Result in The Introduction of New Overlapping Service Areas.*

Gryphon also is opposed to the proposal by ArrayComm, Inc. ("ArrayComm") under which licensees would make an initial selection of paired or unpaired spectrum and then receive new spectrum assignments within the 2500-2690 MHz band based on those selections, with those choosing paired spectrum receiving spectrum adjacent to one another and those choosing unpaired spectrum relegated to two non-contiguous blocks.[11] Segregating TDD operations does nothing to minimize coordination requirements imposed on TDD system operators like Gryphon since, as Motorola, the Coalition and even ArrayComm recognize, a TDD system faces the same coordination challenges whether it is adjacent to another TDD system or an FDD system.[12] Adoption of ArrayComm's proposal would hardly be benign, however, as the market-by-market re-assignment of spectrum suggested by ArrayComm would wreck havoc within the industry.

The record in this proceeding establishes beyond doubt that one of the primary drawbacks of the current regulatory structure results from the overlapping of protected service areas ("PSAs"), which effectively results in the overlap area being a "no man's land" within which neither of the co-channel licensees can provide service.[13] Thus, the Coalition proposed,

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[10] *See Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules*, 15 FCC Rcd 20845, 20851 (2000)(adopting rule revisions that "will enable TDD-based technologies to use either the upper or the lower bands, or both.").

[11] *See* Comments of ArrayComm, WT Docket No. 03-66, at 6-7 (filed Sept. 8, 2003)["ArrayComm Comments"].

[12] *See* Coalition Comments at 32; Comments of Motorola, WT Docket No. 03-66, at 13 (filed Sept. 8, 2003)["Motorola Comments"]; ArrayComm Comments at 2.

[13] *See* "A Proposal To Revise The MDS and ITFS Regulatory Regime," Wireless Communications Ass'n Int'l, Nat'l ITFS Ass'n and Catholic Television Network, RM-10586, at 19-22 (filed Oct. 7, 2003)["Coalition Proposal"]; *NPRM*, 18 FCC Rcd at 6757-59.

and the *NPRM* endorsed that exclusive Geographic Service Areas ("GSAs") be created by formalizing the industry's practice of "splitting the football" created by overlapping PSAs.[14] The net result is that, while each licensee in an overlap situation will have somewhat less territory within its authorized service area, each licensee actually will be able to provide interference-free service to a larger territory as each will gain exclusive use of its portion of the overlap area.

Adoption of the ArrayComm proposal, however, would undermine this approach and result in the re-introduction of overlapping service areas within which neither licensee will be able to provide interference-free service. The adverse consequences of ArrayComm's proposal can be illustrated by its impact on the market where Gryphon plans to deploy its first system. The A Group channels that Gryphon is leasing in its target market have an important attribute that make them particularly compelling for the deployment of a wireless broadband system – they are not licensed for co-channel use in any nearby market. Thus, Gryphon currently is able to provide service without risk of co-channel interference throughout its lessor's entire circular, 35-mile radius PSA, and upon transition to the new bandplan under the Coalition's proposal, Gryphon's lessor will receive a full circular, 35-mile radius geographic service area GSA within which Gryphon's service will be protected against interference.

However, that would not likely be the case under ArrayComm's alternative. There is a market approximately 30 miles from Gryphon's target market for which licenses have been issued for the C, D and G ITFS channel groups and the E, F and H MDS channel groups. Gryphon's lessor, an A Group licensee selecting unpaired spectrum, would receive the 2561.5-2572 MHz band under ArrayComm's option A or the 2500-2511.5 MHz band under

[14] *See* Coalition Proposal at App. A; *NPRM*, 18 FCC Rcd at 6757-59.

ArrayComm's option B. If, as is likely to happen, even one of the licensees in the nearby market chooses unpaired spectrum, it would also receive the 2561.5-2572 MHz band under ArrayComm's option A or the 2500-2511.5 MHz band under ArrayComm's option B. And, once that happens, *the 35-mile radius circular GSA afforded Gryphon's lessor would no longer be its exclusive territory, but instead would be overlapped substantially by the GSA of the newly-minted co-channel licensee in the nearby market*.

As this example illustrates, the ArrayComm proposal is flawed by its failure to consider the implications of creating new co-channel relationships. ArrayComm has failed to consider that some channels in some markets suffer from overlapping service areas while others do not. Thus, the ArrayComm proposal is predicated on the faulty presumption that all channels in the 2500-2690 MHz band are equal. However, as is illustrated by this situation, the Commission cannot fairly reassign spectrum based on the notion that all spectrum is fungible. It clearly is not.

*C. Adoption of The Proposals By PACE and Grand Wireless For Asymmetric Channel Pairing Will Result In Substantial Spectral Inefficiencies.*

If the Commission desires to promote efficient use of the 2500-2690 MHz band, it should reject the proposals advanced by PACE Telecommunications Consortium of Michigan ("PACE") and Grand Wireless Company, Inc. ("Grand Wireless") under which each licensee would receive two channels in either the Lower Band Segment ("LBS") or the Upper Band Segment ("UBS"), one channel in the other, and one channel in the Middle Band Segment ("MBS").[15] While

[15] *See* Comments of PACE Telecommunications Consortium of Michigan, WT Docket No. 03-66, at 5 (filed Sept. 8, 2003)["PACE Comments"]; Comments of Grand Wireless Company, Inc., WT Docket No. 03-66, at 5 (filed Sept. 8, 2003).

Gryphon appreciates that this provides each licensee with some paired spectrum, it hardly is an efficient approach to rebanding.

The fundamental problem with the PACE and Grand Wireless proposals is that each licensee would have but a single 5.5 MHz wide channel in either the LBS or the UBS. This runs counter to the demonstrated need for larger, contiguous blocks of spectrum identified by the Coalition and others. As Motorola properly pointed out in its comments:

> [a] band plan that reconfigures the 2500-2690 MHz band into contiguous spectrum blocks would therefore substantially reduce the potential for harmful interference and allow licensees greater flexibility in deploying innovative wireless services. Contiguous spectrum would also enable more efficient operation of spread spectrum technology. Furthermore, large contiguous blocks would allow the Commission to make spectrum assignment that provide the highest level of technological neutrality and would facilitate the deployment of broadband services.[16]

To again illustrate the problem using Gryphon's initial market, if Grand Wireless or PACE's proposals were adopted the A Group licensee from whom Gryphon leases capacity would become the licensee for 2500-2511 MHz in the LBS, 2572-2578 MHz in the MBS, and 2620-2625.5 MHz in the UBS. That would leave only 11 MHz available in the LBS for Gryphon to deploy its TDD system. That amount of contiguous spectrum is insufficient to meet marketplace demand in even Gryphon's rural market, and significant additional costs (perhaps greater than can be supported by the likely subscriber base in this rural area) would be imposed on the system to either add the non-contiguous 5.5 MHz available to the licensee in the UBS or to add additional cells to increase frequency reuse.

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[16] Motorola Comments at 11-12 (citations omitted). *See also* Hardin Comments at 4 ("splitting the available bandwidth to a single licensee into two separate band segments may render the licensee unable to provide any kind of viable operational system."). For this reason, the proposal by the Ad Hoc MMDS Licensee Consortium that the Commission split MDS licenses between the LBS and the UBS is fundamentally flawed and should be rejected. *See* Comments of Ad Hoc MMDS Licensee Consortium, WT Docket No. 03-66, at 4 (filed Sept. 8, 2003)["Ad Hoc MMDS Comments"]. It does MDS licensees little good to have spectrum in the LBS and in the UBS if the result is they have insufficient spectrum in either to provide a viable service.

Moreover, those costs come without any concomitant benefit. Indeed, adoption of Grand Wireless and PACE's proposals would do nothing to facilitate Gryphon's adoption of FDD technology. Both parties are proposing that the A Group (along with the C, E, G and H Groups) have 11 MHz in the LBS, and 5.5 MHz in the UBS. This additional spectrum in the LBS likely would go unused in FDD systems, as the LBS would likely be used for upstream transmissions and there is little demand for an asymmetric service with the greater capacity in the upstream direction. Thus, Grand Wireless and PACE's proposals serve the interests of neither TDD nor FDD system operators.

*D. The Commission Should Not Terminate Existing Leases.*

Finally, Gryphon strongly objects to the proposal by Spectrum Market, LLC ("Spectrum Market") under which the Commission would void all existing capacity leases to facilitate Spectrum Market's desire to profit from offering private broker services.[17] Leaving aside the Commission's questionable legal authority to invalidate all existing leases (much less to do so here, where such action was not proposed in the *NPRM*), the proposal is fundamentally flawed because it is constructed on a faulty premise – that "it would be essentially impossible for any pre-existing lease to have contemplated fully the potential changes" that will result from this proceeding.[18]

That is nonsense – Gryphon's excess capacity lease was entered into with both sides fully cognizant of the potential for rebanding of the 2500-2690 MHz band and other changes in the regulatory regime. The lessor was advised by a law firm that is pre-eminent in the representation of ITFS licensees, and the parties reached specific agreement on a variety of issues raised by the

[17] *See* Comments of Spectrum Market, WT Docket No. 03-66, at 13-17 (filed Sept. 8, 2003).

[18] *Id.* at 15.

*NPRM*. Indeed, Gryphon suspects it is hardly alone in having entered into leases that contemplate the use of the 2500-2690 MHz band for cellularized broadband services. It will be seven years this week since the Commission first clarified that MDS and ITFS licensees are free to provide Internet access services,[19] and during that period many licensees and system operators have entered into leasing arrangements that fully contemplate streamlining of the regulatory environment as envisioned by the *NPRM* in this proceeding. While termination of these leases might serve Spectrum Market's narrow self-interest, Commission interference with these contracts will serve no public interest whatsoever.[20] To the contrary, termination of ITFS and MDS spectrum leases by administrative fiat would run directly counter to the Commission's goal of promoting the use of spectrum leases as a mechanism for maximizing spectrum utilization.[21]

Similarly, the Commission should reject the absurd filing by the Ad Hoc MMDS Licensee Consortium (a submission that fails to identify even a single group member, much less

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[19] In 1995, when the Commission authorized the use of competitive bidding to award commercial licenses in the band, it made clear that licensees were free to provide services other than video. *See Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service*, 10 FCC Rcd 9589, 9619 (1995), *on recon.* 10 FCC Rcd 13821, 13824-25. In 1996, the Mass Media Bureau, which at the time regulated MDS and ITFS, issued a *Public Notice* making clear that ITFS and MDS licensees were free to utilize their spectrum for the provision of Internet access services. *See* "The Mass Media Bureau Implements Policy for Provision of Internet Service on MDS and Lease ITFS Frequencies," *Public Notice*, DA 96-1720 (rel. Oct. 17, 1996). Thereafter, the Commission issued a variety of authorizations permitting two-way data services using the MDS/ITFS spectrum. *See, e.g.* Applications of Atlantic Microsystems, File Nos. BMDP-9701115KI through 9701115KM (granted Jan. 27, 1997). In 1998, the Commission adopted rules to streamline the process of authorizing MDS and ITFS licensees to construct digital two-way systems capable of providing high-speed, high capacity broadband service via cellularized communication systems to fixed and portable subscriber equipment. *See Amendment of Parts 21 and 74 to Enable Multipoint Distribution System and Instructional Television Fixed Service to Engage in Fixed Two-Way Transmissions*, 13 FCC Rcd 19112 (1998)["*MDS/ITFS Two-Way Order*"]. Subsequently, the Commission authorized the provision of mobile services in the 2500-2690 MHz band. *See Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, 17 FCC Rcd 23193 (2002).

[20] *See* Ad Hoc MMDS Comments at 26 (filed Sept. 8, 2003).

[21] *See Spectrum Policy Task Force Report*, ET Docket No. 02-135, at 17 (Nov. 2002)["SPTF Report"]; *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets,* Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 00-230, FCC 03-113 (rel. Oct. 6, 2003).

justify its claim to representing a "majority" of the MDS licensees in the country) that the Commission declare unlawful any existing lease with a remaining term of more than 3 years. The Commission's clear and unambiguous policy is that ITFS excess capacity leases may extend fifteen years.[22] This policy was adopted because of the Commission's recognition that long-term leases are necessary to permit system operators and their investors to recover the massive expenditures associated with deploying digital wireless broadband systems and to place wireless system operators on an equal footing with cable systems, which typically receive fifteen year franchises.[23] Gryphon has entered into a variety of contractual obligations in connection with the development of its wireless broadband systems in direct reliance on its ability to lease spectrum and amortize its infrastructure expenses over that period. Again, while the members of this "consortium" may reap private benefit were the Commission to free them from their existing spectrum leases, the public interest will in no way be served by a Commission-mandated termination of Gryphon's ITFS excess capacity lease.

It is interesting to note that the comments submitted on behalf of the Independent MMDS Licensee Coalition, which were submitted by the same law firm as the Ad Hoc MMDS Licensee Consortium's and also claims to represent the "majority" of MDS licensees (albeit without identifying a single coalition member), does not call for the termination of existing leases. To the contrary, this filing proposes that where existing leases do not contemplate the regulatory changes envisioned by the *NPRM*, the Commission order the parties to enter into good faith

[22] *See MDS/ITFS Two-Way Order*, 13 FCC Rcd at 19183.

[23] *See id*. Given that the Commission's finding is as valid today as it was when made in 1998, the Commission should reject the proposal by PACE that excess capacity leases of newly-licensed ITFS spectrum be restricted to five year terms. *See* PACE Comments at 6. Not only is such a proposal beyond the scope of the *NPRM*, but it ignores the financial realities associated with constructing wireless broadband systems. Indeed, were the Commission to restrict ITFS excess capacity leases to just five years, Gryphon suspects that few wireless system operator would be willing to construct broadband systems utilizing ITFS spectrum. Certainly, Gryphon would not.

negotiations to amend those leases to conform to the new rules while maintaining as closely as possible the business relationship established under the current lease. While one can question whether even this Commission intervention into the leasing process is necessary, it certainly makes more sense for the Commission to seek to preserve existing leases than to engage in the sort of blanket terminations espoused by Spectrum Market and the Ad Hoc MMDS Licensee Consortium.

*E. Conclusion.*

In his separate statement supporting issuance of the *NPRM*, Chairman Powell remarked that "the time has come to chip off the regulatory barnacles encumbering ITFS and MMDS."[24] Gryphon whole-heartedly agrees, and thus urges the Commission to adopt the Coalition's proposal for revising the MDS/ITFS regulatory regime. Unlike the proposals discussed above that would substitute new regulatory barnacles for the old, the Coalition's approach truly will provide licensees the flexibility necessary to make the most efficient and effective use of the 2500-2690 MHz band.

Respectfully submitted,

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[24] *See NPRM*, 18 FCC Rcd at 6858, Separate Statement of Michael Powell.